

**DEPARTMENT OF HOUSING AND
URBAN DEVELOPMENT**

**Office of the Assistant Secretary for
Fair Housing and Equal Opportunity**

24 CFR Parts 103 and 125

[Docket No. FR-3480-F-03]

RIN 2529-AA62

Fair Housing Initiatives Program

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Final rule.

SUMMARY: This final rule amends the Fair Housing Initiatives Program (FHIP) regulation at 24 CFR part 125 to provide for the implementation of statutory amendments pertaining to private enforcement initiatives; the funding of fair housing organizations; and the implementation of national (including national fair housing month), regional and local, and community-based education and outreach programs. In addition, it corrects a cross-reference contained in part 103.

DATES: Effective date: December 27, 1995.

FOR FURTHER INFORMATION CONTACT: Maxine Cunningham, Director, Office of Fair Housing Initiatives and Voluntary Programs, Room 5234, 451 Seventh Street, SW., Washington, DC 20410-2000. Telephone number (202) 708-0800. A telecommunications device (TDD) for hearing and speech impaired persons is available at (202) 708-9300. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION:

I. Paperwork Reduction Act Statement

The information collection requirements contained in § 125.105 of this rule have been approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), and assigned OMB control number 2529-0033. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

II. Background

A. Program Authority and Description

The Fair Housing Act—Title VIII of the Civil Rights Act of 1968, as amended, 42 U.S.C. 3601-19—charges the Secretary of Housing and Urban Development with responsibility to accept and investigate complaints alleging discrimination based on race,

color, religion, sex, handicap, familial status or national origin in the sale, rental, or financing of most housing, and in other real estate-related transactions. In addition, the Fair Housing Act directs the Secretary to coordinate with State and local agencies administering fair housing laws, and to cooperate with and render technical assistance to public or private entities carrying out programs to prevent and eliminate discriminatory housing practices.

Section 561 of the Housing and Community Development Act of 1987 (1987 Act), 42 U.S.C. 3616 note, established the Fair Housing Initiatives Program (FHIP) to strengthen the Department's enforcement of the Fair Housing Act and to further fair housing. This program assists projects and activities designed to enhance compliance with the Fair Housing Act and substantially equivalent State and local fair housing laws. Implementing regulations are found at 24 CFR part 125.

Section 905 of the Housing and Community Development Act of 1992 (HCDA 1992) (Pub. L. 102-550, approved October 28, 1992), substantially amends section 561 of the Housing and Community Development Act of 1987. On April 1, 1993, the Department published an Advance Notice of Proposed Rulemaking (ANPR) (58 FR 17172) requesting comment on HUD's implementation of section 905 of the Housing and Community Development Act of 1992. The Department received three comments in response to the ANPR.

On August 29, 1994, HUD published a proposed rule to amend the Fair Housing Initiatives Program (59 FR 44596). HUD invited public comments for consideration in drafting a final rule. During the comment period, which ended October 28, 1994, HUD received 15 public comments, 7 from individuals (6 of these being identical form comments submitted in support of comments submitted by an individual broker), 5 from fair housing enforcement organizations, 1 from an organization representing realtors, 1 from an organization representing lenders, and 1 from a lending firm. These comments are discussed in the following section.

B. Public Comments on the Proposed Rule

The public commenters focused on the following issues, listed with their proposed rule section numbers:

1. Definition of Expert Witness: § 125.103.
2. Definition of Meritorious Claims: § 125.103.
3. Waivers: § 125.106.

3. Eligible Activities: § 125.303.
4. Funding for Regionally Produced and Locally Produced Media Programs: §§ 125.303(b)(1) & 125.303(c).
5. Additional Points for Cooperating with Real Estate Industry Organizations: § 125.303(b)(2)(i).
6. Community-based programs: § 125.303(d).
7. Coordination of Activities: § 125.303(f).
8. Multi-year Grants Subject to Annual Performance Evaluation: § 125.401.
9. Guidelines for Private Enforcement Testing: § 125.405.
10. Continued Development of Existing Organizations: § 125.502.
11. Operating Budget Limitations: § 125.502(c).
12. Establishing New Organizations: § 125.503.
13. Awarding Funding to Most Resource-Poor Applicant.
14. Distribution of FHIP Funds According to an Allocation Formula.
15. Impact on Small Entities—Regulatory Flexibility Act.
16. Other Miscellaneous Comments.

Definitions of Expert Witness and (Qualified) Fair Housing Organization: Proposed Section 125.103

One commenter supported the definition of *expert witness* that would permit reimbursement for expert witness fees in cases that settle before the experts testify, and the requirement in the definitions of *fair housing enforcement organization* and *qualified fair housing enforcement organization* that eligible organizations must have conducted complaint investigation, testing and enforcement activities for prescribed periods of time.

Department's response: No response is necessary, since this comment agrees with the proposed rule.

Definition of Meritorious Claims: Proposed Section 125.103

In § 125.103 of the proposed rule, the Department defines *meritorious claims* to mean "enforcement activities that resulted in lawsuits, consent decrees, legal settlements, HUD conciliations and agency initiated settlements with the outcome of monetary awards for compensatory and/or punitive damages to plaintiffs or complaining parties, or affirmative relief and monitoring."

Two commenters with six concurring commenters objected to the proposed rule replacing "bona fide allegation" with the "meritorious claim" standard. These commenters asserted that the proposed rule change will allow fair housing organizations to engage in harassing behavior, and that the

meritorious claim standard will make any business that has made an economic decision to settle out of court an instant target of fair housing groups.

One commenter also felt that the definition in the proposed rule is too broad since almost every claim falls into the proposed definition. This comment recommended that the Department change the definition of *meritorious claim* to read: "enforcement activities that resulted in a monetary award for compensatory or punitive damages, or a settlement for an amount significantly in excess of the normal costs of defense."

In contrast, two commenters supported the Department's decision to define *meritorious claims*, but suggested that "affirmative relief and monitoring" require more than an agreement with a real estate company, lender or insurance company to "promote" Fair Housing. These commenters recommended that HUD define affirmative relief to mean developing an explicit marketing program to gain customers, building or renovating a branch office, providing below market rate loans to targeted neighborhoods, hiring minority employees, and changing the compensation basis for commissioned loan officers.

Department's response: Some of these comments have misinterpreted the role of "meritorious claims" in the FHIP regulation. This definition is used for the purpose of defining the terms *fair housing enforcement organization* and *qualified fair housing enforcement organization*. To qualify as one of these organizations, it is necessary, under the statute, to be "engaged in complaint intake, complaint investigation, testing for fair housing violations and enforcement of *meritorious claims*" (emphasis added).

As for the commenters that suggested additional definition of the phrase "affirmative relief and monitoring" as used in *meritorious claims*, the Department believes that, taken as a whole, the proposed rule's definitions of *fair housing enforcement organization* and *qualified fair housing enforcement organization* are sufficiently stringent to ensure that only experienced organizations qualify. *Meritorious claims* is only one element in these definitions, which also include the elements of complaint intake, complaint investigation, and testing for fair housing violations.

This definition is clarified in the final rule to include conciliations with substantially equivalent agencies (under 24 CFR 115.6).

Waivers: Proposed Section 125.106

Two commenters objected to the waiver provision of § 125.106. One commenter recognized the need for flexibility, but suggested that any waiver to the rule should be subject to public comment.

Department's response: The very purpose of the waiver provision is to provide needed flexibility that would be lost by subjecting each waiver to public comment. Such a waiver provision is a common feature of many HUD rulemakings (see the notice, "Waiver of Regulations and Directives Issued by HUD; Supersession of Redelegations of Authority," at 56 FR 16337, April 22, 1991). The waiver provision at § 125.106 is modified by adding the phrase "Upon determination of good cause," and provides that the waiver be issued by the Assistant Secretary.

As part of its overall process of reinventing regulations, the Department is developing a separate waiver provision rule that would apply to every HUD regulation. When this cross-cutting regulation becomes effective, this program-specific waiver provision will be eliminated.

Eligible Activities: Proposed Section 125.203

One commenter suggested adding the following activities to § 125.203: (1) Linking fair housing organizations regionally in enforcement activities designed to combat broader housing market discriminatory practices; (2) discovering and providing remedies for discrimination in the public and private real estate markets and real estate related transactions, including, but not limited to, making or purchasing of loans or the provision of other financial assistance sales and rentals of housing and housing advertising; and (3) carrying out special projects, including the development of prototypes to respond to new or sophisticated forms of discrimination against persons protected under the Fair Housing Act.

Department's response: Applications for the activities listed would not be excluded from consideration, even without being specifically listed. The preface to the list of eligible activities at § 125.203 stated that eligible activities "may include (but are not limited to) the following:". By only suggesting activities that would be acceptable without attempting to provide an exhaustive or exclusive list, this approach may have caused some confusion by seeming to confer exclusive status on the listed activities. To prevent such problems, and as a part of the Department's efforts to streamline

its rules and eliminate unnecessary regulatory verbiage, such advisory, non-exclusive lists are being eliminated from the final rule. The final rule provides at § 125.104(d) that eligible activities will be announced in Notices of Funding Availability published in the Federal Register.

Funding for Regionally Produced and Locally Produced Media Programs: Proposed Sections 125.303(b)(1) & 125.303(c)

Two commenters objected to permitting regional and local education and outreach funds to be used to develop radio, television and print public service announcements. One of these argued that it is not an efficient expenditure of limited funds, since money will be wasted duplicating what should be developed and produced on a national level. This commenter suggested that funds should be used to develop a high quality national media campaign, and HUD should provide remaining resources to other groups to disseminate the campaign.

Department's response: A complete ban on the development of regional and local media materials is not appropriate. The Department seeks to encourage innovation while avoiding duplication in its award of FHIP funds.

Additional Points for Cooperating with Real Estate Industry Organizations: Proposed Section 125.303(b)(2)(i)

One commenter supported the proposed rule's giving an applicant preference points if the applicant demonstrates cooperation with real estate industry organizations.

In contrast, two commenters objected to HUD encouraging cooperation with the real estate industry by awarding "preference points" to applicants which cooperate with the real estate industry. One of these commenters argued that industry would not cooperate or otherwise support an effort that would encourage people to file complaints against members of the industry.

Department's response: Although HCDA 1992 section 905, the statutory amendment and expansion of FHIP, acknowledges (in subsection 905(a), Findings) the evidence of continuing and pervasive discrimination in housing markets, it also recognizes that "continuing educational efforts by the real estate industry are a useful way to increase understanding by the public of their fair housing rights and responsibilities". Later, in subsection 905(d)(1), the statute provides that, "The Secretary shall encourage cooperation with real estate industry organizations in the national education

and outreach program." The Department wishes to encourage every effort to reach the goal of compliance with the letter and the spirit of the Fair Housing Act, and believes, along with the Congress, that the real estate industry can make valuable contributions to achieving this goal. The two comments disagreeing with the preference for cooperation with the industry assume, justifiably, that persons aware of their rights would more likely act to enforce those rights when they are violated. However, this assumption does not lead to the conclusion that the industry charged with observing those rights would be uncooperative in informing the public and its individual members of the industry's responsibilities. To the contrary, the industry would benefit through reduced compliance costs from active engagement in informing the public of their rights and the resulting greater awareness of its own responsibilities. Further, it would be fair to assume that the national goals of the Fair Housing Act can be more quickly and efficiently achieved with the active, positive participation of industry than without it.

Community-Based Programs: Proposed Section 125.303(d)

One commenter objected to HUD's interpretation of the term "community based activities" in the authorizing statute to allow HUD to set aside a special funding for community based neighborhood groups. This commenter argued that Congress intended the term "community based activities" to mean that education and outreach activities could be developed for local communities by fair housing organizations or other eligible applicants.

Department's response: Although this comment is not relevant to the rule itself, which does not address special funding for community based groups, the Department agrees that education and outreach activities could be developed for local communities by fair housing organizations or other eligible applicants. However, this comment provides yet another opportunity for the Department to stress that in order to be flexible and responsive to diverse needs, the FHIP will be administered so as to permit the targeting of funds in NOFAs to specific types of activities, locations, and recipients.

The description of activities that are "community-based" in scope is also modified in the final rule to use the more familiar term "neighborhood" rather than "geographic area."

Coordination of Activities: Proposed Section 125.303(f)

One commenter suggested expanding § 125.303(f) to require that a private FHO provide evidence with the application that it has consulted with State and/or local public enforcement agencies to coordinate activities to be funded under the *Private Enforcement Initiative* with existing and/or planned public enforcement efforts.

Department's response: The Department disagrees with this comment. Consultation and coordination of public and private efforts could have a negative impact on an applicant's ability to maintain the confidentiality of proposed testing targets and strategies.

Multi-Year Grants Subject to Annual Performance Evaluation: Proposed Section 125.401

Five commenters supported making funding of PEI multi-year grants subject to a performance review of the previous year's activities. One of these commenters suggested that HUD solicit comments from interested parties, including those involved as defendants to FHIP funded testing complaints, when conducting the performance review. Two of these commenters also suggested that HUD continue funding if HUD fails to complete the review in a timely fashion since a recipient may not have the cash reserves to maintain staff until a review is completed. These two commenters also suggested that HUD consider four year funding cycles since many enforcement actions require up to four years or more to complete litigation, or monitor requirements of consent decrees or HUD conciliations.

Department's response: Each of these comments may be implemented by the Department in a NOFA or through its own internal procedures. HUD has already initiated multi-year funding in its FHIP NOFAs and intends to continue to do so. HUD will not discontinue funding if it is at fault for not completing a performance review in a timely fashion, but if the Department is unable to complete its review due to recipient deficiencies (such as inadequate accounting for funds and activities), funds may be discontinued. Interested parties may contact the Department at any time with information relevant to its evaluation of FHIP-funded recipients. With respect to comments from those involved as defendants as a result of FHIP-funded testing, while these persons are free to comment, their status as defendants in a pending action would normally preclude the Department from acting on

their comments while the action is pending.

Eligible Applicants Under the Private Enforcement Initiative: Proposed Section 125.402

One commenter objected to awarding PEI funds to non-testing groups. Only groups with at least one year of experience in complaint intake, investigation, testing, and enforcement should get PEI awards.

Department's response: The Department agrees with this and related comments. Please refer to the discussion under the heading, "Continued Development of Existing Organizations: Proposed 125.502", below.

Guidelines for Private Enforcement Testing: Proposed Section 125.405

Section 125.405 is currently entitled, "Guidelines for private enforcement testing." The proposed rule would remove the testing guidelines in § 125.405, but a new § 125.107 would prohibit testers from having prior felony convictions or convictions of crimes involving fraud or perjury, and would require that testers receive training or be experienced in testing procedures and techniques.

Three commenters with six concurring commenters objected to the absence of a consistent standard for conducting testing under the proposed rule. In general, these commenters criticized the Department for removing most of § 125.405, and stressed the need for regulatory controls to ensure that testers are objective and credible. These commenters also stressed the need for the Department to ensure that grantees do not have any conflicts of interest which might interfere with testing.

One of these commenters with six concurring commenters asserted that HUD erroneously assumes that an established fair housing organization knows how to conduct valid testing and/or has the integrity to conduct valid testing. These commenters also alleged that not all reports are accurate and true, and recommended that HUD more closely scrutinize information submitted by fair housing organizations in grant applications and quarterly reports. They agreed the final rule should prohibit a fair housing organization receiving FHIP funding from owning a for-profit subsidiary which directly competes with licensed real estate brokers, and that at a minimum, a for-profit subsidiary of a fair housing organization should not have any access to the "set-aside" apartments that are included in a settlement agreement with a fair housing organization.

Three commenters made suggestions as to specific criteria which should be contained in the final rule. One commenter suggested that the final rule require the following: (1) Grantees of FHIP testing and enforcement funds must demonstrate that testers have the training or experience to properly conduct tests; (2) Testers must objectively report their findings; (3) Grantees may not compromise the integrity of tests and tester reports; (4) Grantees must ensure that potential conflicts of interest do not interfere with the design, conduct or evaluation of tests; and (5) Grantees will file complaints/lawsuits as a result of testing only if there is a reasonable cause to believe that a violation of the Fair Housing Act occurred.

This commenter further objected to general testing where no bona fide allegation of discrimination exists, stating that general testing poses a hardship on the industry by taking valuable time for the testing to determine whether discrimination exists and takes resources away from testing those situations where there is an allegation of discrimination. This commenter opined that the purposes of the FHIP program support requiring a bona fide allegation prior to commencement of testing.

One commenter with six concurring commenters recommended that HUD require the following before initiating any action: (1) Fair housing organizations submit for HUD review and approval detailed documentation concerning any "bona fide" allegation of fair housing violations; (2) HUD give written approval to a fair housing organization before commencement of testing; and (3) once the fair housing organization begins testing, the fair housing organization submits to HUD detailed activity logs and written test conclusions.

Similarly, yet another commenter suggested that HUD maintain the following in the final rule: (1) Recipients of HUD FHIP funding may not have an economic interest in the outcome of the test for discrimination, have a specific bias toward the business tested, be a licensed competitor of the respondent, be related to one of the parties in the case, or have any other specific bias or conflict of interest which would prevent or limit his or her objectivity; (2) Testers may not communicate their test results with one another; and (3) Testers must report all relevant information.

In contrast, three commenters supported the removal of testing guidelines. One of these commenters reasoned that federal courts and HUD

ALJs are in the best position to determine the validity of testing procedures. This commenter also stated that testing is continually evolving to accommodate changing discriminatory practices identified in the market place, and suggested that the rule should be flexible enough to accommodate changing practices. However, the commenter suggested that the final rule provide that HUD will scrutinize applicants that have little or no legal administrative results for enforcement activities.

Department's response: HUD agrees with the commenters who recommend conflict of interest provisions be maintained in the rule, and most of the conflict provisions at § 125.405(c)(3) of the current rule are included with the tester provisions at § 125.107 of this final rule.

HUD also agrees with the commenter who stated that testing is continually evolving to accommodate changing discriminatory practices identified in the market place, and that the rule should be flexible enough to accommodate changing practices. For these reasons, the Department is not including additional specific requirements for testing in this final rule, including the requirement for a bona fide allegation prior to testing.

Continued Development of Existing Organizations: Proposed Section 125.502

Two commenters objected to HUD making the third category of applicants ("[n]onprofit groups organizing to build their capacity to provide fair housing enforcement") eligible to receive FHIP funding under § 125.502. One of the commenters suggested that funding for this category is already available under § 125.503, Establishing New Organizations, and that funding for "capacity building" should only be used to assist existing groups. This commenter also felt that since all of the activities under private enforcement are eligible for funding, HUD is undermining the intent of the statute to promote high quality enforcement activities. The commenter warned that HUD should consider the practical risks of providing enforcement funds to organizations with no proven track record. This commenter further disagreed with HUD that making this category of nonprofit groups eligible for funding will increase the number of private non-profit fair housing organizations, and suggested that qualifications are more important than numbers. Finally, this commenter argued that mere status as a nonprofit organization should not qualify the

organization to receive funds for fair housing enforcement since many nonprofits opposing fair housing efforts will be eligible.

Department's response: The Department does not agree with these comments. Section 905 specifically includes nonprofit groups organizing to build their capacity to provide fair housing enforcement as eligible for continued development funding. If continued development funding were limited to fair housing organizations, it would not differ from the Private Enforcement Initiative, and there would be no need for this separate category of FHIP activities. As distinct from activities under proposed § 125.503, which are specifically intended to result in the establishment of new organizations, the activities funded under proposed § 125.502 are intended to permit existing organizations, whether or not they are already fair housing organizations, to build their capacity to provide fair housing enforcement. The argument that nonprofits opposing fair housing efforts will be funded is not valid, since funds are competitively awarded after an evaluation of the proposed activities. Activities that oppose fair housing efforts would not be funded, and any grantee who did engage in activities opposing fair housing activities would be liable for misuse of funds.

To preserve the distinct characters of the Private Enforcement Initiative and the Fair Housing Organization Initiative highlighted by these comments, and in response to a comment discussed above (Eligible Applicants under the Private Enforcement Initiative: Proposed § 125.402), the final rule limits eligible applicants for PEI funding to qualified fair housing organizations (QFHOs) and fair housing enforcement organizations with at least 1 year of experience in complaint intake, complaint investigation, testing for fair housing violations and enforcement of meritorious claims.

Establishing New Organizations: Proposed Section 125.503

One commenter suggested that the final rule contain criteria that an applicant must satisfy to establish a new organization. The commenter suggested that an applicant should have a firm grasp of all federal, state and local fair housing laws, successful experience in investigating, testing, conciliating and litigating fair housing complaints or access to training to receive high quality assistance in the development of the new organization.

With regard to targeted areas (§ 125.503(c)), this commenter also

suggested that HUD should consider funding applicants if the applicant demonstrates the need—the existence of a FHAP or QFHO within the state should never outweigh the documented need for private enforcement activities.

Department's response: The Department initially reasoned, in the proposed rule, that addressing the national need for private fair housing enforcement organizations would best be served by making this category of funding for establishing new organizations broadly available. The commenter emphasizes the broad range of specialized knowledge and experience that would be necessary to establish a successful, efficient enforcement organization, and the Department agrees with the validity of these observations. In order to accommodate both concerns (national need and specialized knowledge), the final rule provides that QFHOs, FHOs, and other organizations with at least three years of experience in complaint intake, complaint investigation, and enforcement of meritorious claims involving the use of testing evidence are eligible applicants for funding to establish new organizations. This will maximize the pool of eligible applicants, while still limiting it to those with substantial fair housing enforcement experience.

The Department also agrees with the comment that the rule should permit funding applications for areas with a demonstrated need for a fair housing organization. The Department, in its FHIP NOFA published annually in the Federal Register, may identify targeted unserved and underserved areas that will receive priority for funding under the Establishing New Organizations component of the Fair Housing Organizations Initiative. The final rule provides that an applicant may also seek funding to establish a new organization in a locality not identified as a target area, but in such a case, the applicant must submit sufficient evidence to establish the proposed area as being currently underserved by fair housing enforcement organizations or as containing large concentrations of protected classes.

Awarding Funding to Most Resource-Poor Applicant

In the preamble of the proposed rule, the Department specifically solicited public comment on whether it should award FHIP funds to the applicant that is most resource-poor when choosing between two otherwise equally deserving applicants. The Department received three public comments on this issue. All three commenters objected to

using the "resource-poor" factor to award funding in the event of a tie between two applicants.

Two commenters stated that a QFHO or FHO may have solid funding for particular activities, but the specific activity for which it seeks FHIP funds may be one that its local funder will not support. These commenters also suggested that HUD's objective should not be to distribute the funds in the most efficient manner, but rather in a manner that will have the greatest impact on fair housing enforcement.

Another commenter supported funding resource-poor organizations, but felt that funding for more substantial organizations was more critical.

Department's response: The Department will provide for tie-breaking criteria in individual NOFAs, and in that way, it will be able to use a variety of factors, such as the term of the proposed activities and the amount of funding requested, as appropriate in the context of the priorities identified for a particular funding round.

Distribution of FHIP Funds According to an Allocation Formula

One comment in response to the ANPR suggested that HUD fund FHIP as a noncompetitive, entitlement category to provide general operating funds. In the proposed rule, HUD responded that with the present level of FHIP funding, entitlement funding would not be an efficient method of implementing FHIP. However, HUD stated that it might consider such an approach in the future, depending upon the amount of future appropriations, and the number of QFHOs. HUD also requested public comment on the issue of distributing FHIP funds according to an allocation formula, and on what criteria might be used to provide for the fair and equitable distribution of funds on such a basis.

The Department received three comments from the public on this issue. One commenter recommended that FHIP funding should be an entitlement program, and that HUD should give preference to fair housing groups which have been in existence for more than 5 years, with a history of litigation.

Two commenters supported the concept of FHIP as an entitlement program, and offered to work with HUD in developing an equitable formula. However, no criteria for distribution were suggested.

Department's response: Although the comments received on this issue favored a formula distribution, the lack of suggestions for specific distribution criteria, and the continuing limiting factor of the amounts made available for

funding require that funding continue on a competitive basis.

Miscellaneous Comments

One commenter with six concurring commenters suggested that HUD adopt the following as part of the final rule: (1) The Department should provide an administrative procedure for members of the public to file complaints against fair housing organizations that engage in questionable practices, and if an ALJ determines that the litigation is baseless, then HUD should deny further FHIP funding to the offending fair housing group for 5 years from the date of the ALJ's determination; (2) HUD should require that each fair housing organization submit its entire budget to HUD to ensure that FHIP funds do not constitute more than 50% of its total budget pursuant to section 125.502(c)(1); (3) Fair housing groups should have the same monetary award limitations as HUD has: \$10,000 for the first offense, \$25,000 for the second offense, and \$50,000 for the third offense; and (4) HUD should require that each fair housing organization file a detailed report with HUD on the disbursements of any settlement award, and that this report be available for public inspection.

Department's response: (1) Aggrieved parties may call HUD's attention to misconduct on the part of its grantees at any time. However, as a general rule, the Department will not act on any matter which involves a pending action before a court or other tribunal. Because of the broad range of possible findings, the Department does not consider a funding ban for any fixed term an appropriate remedy to be set in a rule. In reviewing applications, the Department currently considers an applicant's experience in formulating and carrying out programs to prevent or eliminate discriminatory practices, including the applicant's management of past and current FHIP or other civil rights projects. Any past misconduct by an applicant is taken into account during this review.

(2) The Department's FHIP NOFAs currently require applicants to submit an operating budget that describes the applicant's total planned expenditures from all sources, including the value of in-kind and monetary contributions, in the year for which funding is sought. This is required so that the 50% budget determination pursuant to proposed section 125.502(c)(1) may be made. To memorialize this requirement under a rule is not necessary.

(3) Because the authorizing statute does not set monetary award limitations on fair housing groups, HUD will not

impose them administratively without a clear mandate to do so.

(4) The laws under which non-profits are organized require them to file annual reports, including financial information, which is a matter of public record. Beyond this extent, the Department will not require additional disclosure.

One commenter suggested that all privately enforced Fair Housing Act actions be reviewed by the Attorney General through use of a similar declaration process as in qui tam litigation. This commenter further suggested some sort of governmental review/approval of FHIP-funded litigation counsel and regulatory control/cap for FHIP-funded legal fees. In addition, the commenter suggested that the final rule address HUD's own liability for frivolous lawsuits brought by private litigants under Rule 11 of the Federal Rules of Civil Procedure, and contain regulatory protection of proprietary information disclosed with the expectation of confidence during the litigation process.

Department's response: Review by the Attorney General through use of a declaration process is beyond the scope of the Department's rulemaking and would have to be pursued through a legislative amendment. The Department is not liable under Rule 11 of the Federal Rules of Civil Procedure for lawsuits brought by private litigants. Protection of proprietary information should be pursued under the rules of the forum in which an action is brought, and the Department declines to address this issue in its rule.

One commenter supported the continued eligibility of real estate organizations to receive educational and outreach funds, but urged HUD to make real estate organizations eligible in their own right to receive FHIP Educational and Outreach funds. The commenter stated that real estate organizations do carry out programs to prevent and eliminate discriminatory housing practices. The commenter also asserted that real estate organizations provide essential education to both real estate professionals and the public on fair housing rights and responsibilities, and are in the unique position of having direct contact with members of the public at the time of sale, lease or purchase.

Department's response: Real estate organizations are eligible to receive educational and outreach funds, in accordance with section 905, as "public or private entities that are formulating or carrying out programs to prevent or eliminate discriminatory housing practices". Section 905 recognized the

value of real estate organizations in continuing educational efforts to increase understanding by the public of their fair housing rights and responsibilities, and the Department agrees.

Finally, one commenter recommended that FHIP place emphasis on enforcement over education; that FHIP deadlines should be reasonable (90 days to apply and staggered for each Initiative); that NOFA criteria should be more explicit; and that non-funded proposals should be given feedback.

Department's response: Because of the way the FHIP program is organized, it does place more emphasis on enforcement over education. Three of the Initiatives basically fund enforcement activities; only the Education and Outreach Initiative funds strictly educational activities. Issues as to deadlines and criteria are addressed in NOFAs, in which the Department makes every effort to assure the efficient and equitable distribution of funds. Feedback on proposals is a Departmental administrative issue that is outside the scope of this rule. Such a service is heavily dependent on the availability of resources to the Department.

III. Reinvention of the FHIP Final Rule

As mentioned in the discussion of the comments on the proposed rule, the Department is taking advantage of the publication of this final rule to streamline the FHIP rule in accordance with its overall effort to reinvent regulations. Rather than amending individual sections within part 125, the entire part has been re-drafted to eliminate extraneous material such as language that only repeats the statutory language, or provisions that are only advisory (rather than binding) or non-exclusive, such as lists of suggested activities. The rule is not substantively changed beyond those issues addressed in the proposed rule and in response to the comments submitted on the proposed rule. The result sought is a program that will be more responsive and administratively flexible to address the needs recognized in the authorizing statute.

IV. Technical Correction to Part 103

Presently, 24 CFR 103.405(b)(3) makes reference to actions that are to be taken "in accordance with 24 CFR 104.40". There is no such section, and the correct reference should be to 24 CFR 104.410(a). The correction is made in this final rule.

V. Findings and Certifications

Regulatory Planning and Review.

This rule has been reviewed in accordance with Executive Order 12866, issued by the President on September 30, 1993 (58 FR 51735, October 4, 1993). Any changes to the rule resulting from this review are available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk.

Environmental Review.

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR Part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969. The Finding of No Significant Impact is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk at the above address.

Impact on Small Entities.

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this final rule before publication and by approving it certifies that this rule does not have a significant economic impact on a substantial number of small entities. The purpose of the rule is to provide funding for fair housing investigation and enforcement, and education and outreach activities.

Federalism Impact.

The General Counsel, as the Designated Official under section 6(a) of Executive Order 12612, *Federalism*, has determined that the policies contained in this rule will not have substantial direct effects on states or their political subdivisions, or on the relationship between the federal government and the states, or on the distribution of power and responsibilities among the various levels of government. As a result, the rule is not subject to review under the order. The rule is limited to implementing statutorily required revisions to the existing Fair Housing Initiatives Program Regulation.

Impact on the Family.

The General Counsel, as the Designated Official under Executive Order 12606, *The Family*, has determined that this rule has potential for a beneficial, although indirect, impact on family formation, maintenance, and general well-being. By promoting the values of fair housing, the rule would benefit families by seeking to end discrimination as a factor in the availability of housing. Accordingly,

since the impact on the family is beneficial, although indirect, no further review is considered necessary.

List of Subjects

24 CFR Part 103

Administrative practice and procedure, Aged, Fair housing, Individuals with disabilities, Intergovernmental relations, Investigations, Mortgages, Penalties, Reporting and recordkeeping requirements.

24 CFR Part 125

Fair housing, Grant programs—housing and community development, Reporting and recordkeeping requirements.

The Catalog of Federal Domestic Assistance Numbers for the Fair Housing Initiatives Program are 14.408, 14.409, 14.410 and 14.413.

Accordingly, the Department amends parts 103 and 125 of title 24 of the Code of Federal Regulations as follows:

PART 103—FAIR HOUSING-COMPLAINT PROCESSING

1. The authority citation for part 103 continues to read as follows:

Authority: 42 U.S.C. 3601–3619; 42 U.S.C. 3535(d).

2. In § 103.405, paragraph (b)(3) is revised to read as follows:

§ 103.405 Issuance of charge.

* * * * *

(b) * * *

(3) Serve the charge and notifications in accordance with 24 CFR 104.410(a); and

* * * * *

3. Part 125 is revised to read as follows:

PART 125—FAIR HOUSING INITIATIVES PROGRAM

Sec.

125.103 Definitions.
125.104 Program administration.
125.105 Applications requirements.
125.106 Waivers.
125.107 Testers.
125.201 Administrative Enforcement Initiative.
125.301 Education and Outreach Initiative.
125.401 Private Enforcement Initiative.
125.501 Fair Housing Organizations Initiative.

Authority: 42 U.S.C. 3616 note; 42 U.S.C. 3535(d).

§ 125.103 Definitions.

In addition to the definitions that appear at section 802 of title VIII (42 U.S.C. 3602), the following definitions apply to this part:

Assistant Secretary means the Assistant Secretary for Fair Housing and Equal Opportunity in the Department of Housing and Urban Development.

Department means the Department of Housing and Urban Development (HUD).

Expert witness means a person who testifies, or who would have testified but for a resolution of the case before a verdict is entered, and who qualifies as an expert witness under the rules of the court where the litigation funded by this part is brought.

Fair housing enforcement organization (FHO) means any organization, whether or not it is solely engaged in fair housing enforcement activities, that—

(1) Is organized as a private, tax-exempt, nonprofit, charitable organization;

(2) Is currently engaged in complaint intake, complaint investigation, testing for fair housing violations and enforcement of meritorious claims; and

(3) Upon the receipt of FHIP funds will continue to be engaged in complaint intake, complaint investigation, testing for fair housing violations and enforcement of meritorious claims.

The Department may request an organization to submit documentation to support its claimed status as an FHO.

FHIP means the Fair Housing Initiatives Program authorized by section 561 of the Housing and Community Development Act of 1987 (42 U.S.C. 3616 note).

Meritorious claims means enforcement activities by an organization that resulted in lawsuits, consent decrees, legal settlements, HUD and/or substantially equivalent agency (under 24 CFR 115.6) conciliations and organization initiated settlements with the outcome of monetary awards for compensatory and/or punitive damages to plaintiffs or complaining parties, or other affirmative relief, including the provision of housing.

Qualified fair housing enforcement organization (QFHO) means any organization, whether or not it is solely engaged in fair housing enforcement activities, that—

(1) Is organized as a private, tax-exempt, nonprofit, charitable organization;

(2) Has at least 2 years experience in complaint intake, complaint investigation, testing for fair housing violations and enforcement of meritorious claims; and

(3) Is engaged in complaint intake, complaint investigation, testing for fair housing violations and enforcement of

meritorious claims at the time of application for FHIP assistance.

For the purpose of meeting the 2-year qualification period for the activities included in paragraph (2) of this definition, it is not necessary that the activities were conducted simultaneously, as long as each activity was conducted for 2 years. It is also not necessary for the activities to have been conducted for 2 consecutive or continuous years. An organization may aggregate its experience in each activity over the 3 year period preceding its application to meet the 2-year qualification period requirement.

The Department may request an organization to submit documentation to support its claimed status as a QFHO.

Title VIII means title VIII of the Civil Rights Act of 1968, as amended (42 U.S.C. 3600–3620), commonly cited as the Fair Housing Act.

§ 125.104 Program administration.

(a) FHIP is administered by the Assistant Secretary.

(b) FHIP funding is made available under the following initiatives:

(1) The Administrative Enforcement Initiative;

(2) The Education and Outreach Initiative;

(3) The Private Enforcement Initiative; and

(4) The Fair Housing Organizations Initiative.

(c) FHIP funding is made available in accordance with the requirements of the authorizing statute (42 U.S.C. 3616 note), the regulation in this part, and Notices of Funding Availability (NOFAs), and is awarded through a grant or other funding instrument.

(d) Notices of Funding Availability under this program will be published periodically in the Federal Register. Such notices will announce amounts available for award, eligible applicants, and eligible activities, and may limit funding to one or more of the Initiatives. Notices of Funding Availability will include the specific selection criteria for awards, and will indicate the relative weight of each criterion. The selection criteria announced in Notices of Funding Availability will be designed to permit the Department to target and respond to areas of concern, and to promote the purposes of the FHIP in an equitable and cost efficient manner.

(e) All recipients of FHIP funds must conform to reporting and record maintenance requirements determined appropriate by the Assistant Secretary. Each funding instrument will include provisions under which the Department may suspend, terminate or recapture

funds if the recipient does not conform to these requirements.

(f) Recipients of FHIP funds may not use such funds for the payment of expenses in connection with litigation against the United States.

(g) All recipients of funds under this program must conduct audits in accordance with part 44 or part 45, as appropriate, of this title.

§ 125.105 Application requirements.

Each application for funding under the FHIP must contain the following information, which will be assessed against the specific selection criteria set forth in a Notice of Funding Availability.

(a) A description of the practice (or practices) that has affected adversely the achievement of the goal of fair housing, and that will be addressed by the applicant's proposed activities.

(b) A description of the specific activities proposed to be conducted with FHIP funds including the final product(s) and/or any reports to be produced; the cost of each activity proposed; and a schedule for completion of the proposed activities.

(c) A description of the applicant's experience in formulating or carrying out programs to prevent or eliminate discriminatory housing practices.

(d) An estimate of public or private resources that may be available to assist the proposed activities.

(e) A description of the procedures to be used for monitoring conduct and assessing results of the proposed activities.

(f) A description of the benefits that successful completion of the project will produce to enhance fair housing, and the indicators by which these benefits are to be measured.

(g) A description of the expected long term viability of project results.

(h) Any additional information that may be required by a Notice of Funding Availability published in the Federal Register.

(Approved by the Office of Management and Budget under control number 2529-0033. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.)

§ 125.106 Waivers.

Upon determination of good cause, the Assistant Secretary may waive, in a published Notice of Funding Availability or other Federal Register notice, any requirement in this part that is not required by statute.

§ 125.107 Testers.

The following requirements apply to testing activities funded under the FHIP:

(a) Testers must not have prior felony convictions or convictions of crimes involving fraud or perjury.

(b) Testers must receive training or be experienced in testing procedures and techniques.

(c) Testers and the organizations conducting tests, and the employees and agents of these organizations may not:

(1) Have an economic interest in the outcome of the test, without prejudice to the right of any person or entity to recover damages for any cognizable injury;

(2) Be a relative of any party in a case;

(3) Have had any employment or other affiliation, within one year, with the person or organization to be tested; or

(4) Be a licensed competitor of the person or organization to be tested in the listing, rental, sale, or financing of real estate.

§ 125.201 Administrative Enforcement Initiative.

The Administrative Enforcement Initiative provides funding to State and local fair housing agencies administering fair housing laws recognized by the Assistant Secretary under § 115.6 of this subchapter as providing rights and remedies which are substantially equivalent to those provided in title VIII.

§ 125.301 Education and Outreach Initiative.

(a) The Education and Outreach Initiative provides funding for the purpose of developing, implementing, carrying out, or coordinating education and outreach programs designed to inform members of the public concerning their rights and obligations under the provisions of fair housing laws.

(b) Notices of Funding Availability published for the FHIP may divide Education and Outreach Initiative funding into separate competitions for each of the separate types of programs (i.e., national, regional and/or local, community-based) eligible under this Initiative.

(c) National program applications, including those for Fair Housing Month funding, may be eligible to receive, as provided for in Notices of Funding Availability published in the Federal Register, a preference consisting of additional points if they:

(1) Demonstrate cooperation with real estate industry organizations; and/or

(2) Provide for the dissemination of educational information and technical assistance to support compliance with the housing adaptability and accessibility guidelines contained in the Fair Housing Amendments Act of 1988.

(d) Activities that are regional are activities that are implemented in adjoining States or two or more units of general local government within a state. Activities that are local are activities whose implementation is limited to a single unit of general local government, meaning a city, town, township, county, parish, village, or other general purpose political subdivision of a State. Activities that are community-based in scope are those which are primarily focused on a particular neighborhood area within a unit of general local government.

(e) Each non-governmental recipient of regional, local, or community-based funding for activities located within the jurisdiction of a State or local enforcement agency or agencies administering a substantially equivalent (under part 115 of this subchapter) fair housing law must consult with the agency or agencies to coordinate activities funded under FHIP.

§ 125.401 Private Enforcement Initiative.

(a) The Private Enforcement Initiative provides funding on a single-year or multi-year basis, to investigate violations and obtain enforcement of the rights granted under the Fair Housing Act or State or local laws that provide rights and remedies for discriminatory housing practices that are substantially equivalent to the rights and remedies provided in the Fair Housing Act. Multi-year funding may be contingent upon annual performance reviews and annual appropriations.

(b) Organizations that are eligible to receive assistance under the Private Enforcement Initiative are:

(1) Qualified fair housing enforcement organizations.

(2) Fair housing enforcement organizations with at least 1 year of experience in complaint intake, complaint investigation, testing for fair housing violations and enforcement of meritorious claims. For the purpose of meeting this 1 year qualification period, it is not necessary that the activities were conducted simultaneously, as long as each activity was conducted for 1 year. It is also not necessary for the activities to have been conducted for a continuous year. An organization may aggregate its experience in each activity over the 2-year period preceding its application to meet this 1 year qualification period requirement.

§ 125.501 Fair Housing Organizations Initiative.

(a) The Fair Housing Organizations Initiative of the FHIP provides funding to develop or expand the ability of existing eligible organizations to

provide fair housing enforcement, and to establish, on a single-year or multi-year basis contingent upon annual performance reviews and annual appropriations, new fair housing enforcement organizations.

(b) *Continued development of existing organizations.*

(1) *Eligible applicants.* Eligible for funding under this component of the Fair Housing Organizations Initiative are:

(i) Qualified fair housing enforcement organizations;

(ii) Fair housing enforcement organizations; and

(iii) Nonprofit groups organizing to build their capacity to provide fair housing enforcement.

(2) *Operating budget limitation.* (i) Funding under this component of the Fair Housing Organizations Initiative may not be used to provide more than 50 percent of the operating budget of a recipient organization for any one year.

(ii) For purposes of the limitation in this paragraph, *operating budget* means the applicant's total planned budget expenditures from all sources, including the value of in-kind and monetary contributions, in the year for which funding is sought.

(c) *Establishing new organizations.*

(1) *Eligible applicants.* Eligible for funding under this component of the

Fair Housing Organizations Initiative are:

(i) Qualified fair housing enforcement organizations;

(ii) Fair housing enforcement organizations; and

(iii) Organizations with at least three years of experience in complaint intake, complaint investigation, and enforcement of meritorious claims involving the use of testing evidence.

(2) *Targeted areas.* FHIP Notices of Funding Availability may identify target areas of the country that may receive priority for funding under this component of the Fair Housing Organizations Initiative. An applicant may also seek funding to establish a new organization in a locality not identified as a target area, but in such a case, the applicant must submit sufficient evidence to establish the proposed area as being currently underserved by fair housing enforcement organizations or as containing large concentrations of protected classes.

Dated: August 17, 1995.

Elizabeth K. Julian,

Acting Deputy, Assistant Secretary for Policy and Initiatives, Fair Housing and Equal Opportunity.

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